

PETER D. KEISLER
Assistant Attorney General

KEVIN V. RYAN
United States Attorney

ELIZABETH J. SHAPIRO (D.C. Bar No. 418925)
EDWARD H. WHITE (D.C. Bar No. 468531)
U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Avenue, N.W., Room 6110
Washington, D.C. 20530
Telephone: (202) 514-5108
Facsimile: (202) 318-4268
Email: ned.white@usdoj.gov

Attorneys for Defendants Department of Defense
and United States Central Command

COLLEEN FLYNN (SBN 235281)
CHRIS FORD (SBN 239376)
3435 Wilshire Blvd., Suite 2900
Los Angeles, CA 90010
Telephone: (213) 252-9444
Facsimile: (213) 252-0091
Email: colleen_ucsc@hotmail.com

W. GORDON KAUPP (SBN 226141)
115 ½ Bartlett Street
San Francisco, CA 94110
Telephone: (415) 285-8091
Facsimile: (415) 285-8092
Email: gordonk@hotmail.com

Attorneys for Plaintiffs Marguerite Hiken
and the Military Law Task Force

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

MARGUERITE HIKEN and
THE MILITARY LAW TASK FORCE,

Plaintiffs,

v.

DEPARTMENT OF DEFENSE and
UNITED STATES CENTRAL COMMAND

Defendants.

)
)
) Case No. CV-06-2812 (MHP)
)
) **STIPULATION TO PERMIT**
) **DEFENDANTS TO FILE A**
) **SURREPLY AND TO POSTPONE**
) **HEARING**
)
) HEARING ON CROSS MOTIONS FOR
) SUMMARY JUDGMENT
) Date: February 26, 2007
) Time: 2:00 p.m.

Pursuant to Civil L.R. 7-12, and subject to the Court's approval, defendants Department
of Defense and United States Central Command ("defendants") and plaintiffs Marguerite Hiken
and the Military Law Task Force ("plaintiffs") agree and stipulate to allow defendants to file a
Stipulation to Permit Surreply
and to Postpone Hearing
CV-06-2812 (MHP)

1 surreply, not to exceed 20 pages, by March 5, 2007, and to postpone the hearing on cross-
 2 motions for summary judgment, previously scheduled for February 26, 2007, until March 12,
 3 2007 or sometime thereafter.
 4

5 Good cause exists to permit defendants to file a surreply and to postpone the hearing on
 6 the parties' cross-motions for summary judgment. On February 2, 2007, plaintiffs filed their
 7 Reply in Support of Their Motion for Summary Judgment and Opposition to Defendants' Reply
 8 ("Plaintiffs' Reply") (dkt. no. 39), which is 39 pages long and thus exceeds the 15 page limit for
 9 reply briefs under the Court's Civil Local Rules 7-3(c) and 7-4(b).¹ Plaintiffs' Reply also raises
 10 several new arguments that were not previously presented in the parties' cross-motions for
 11 summary judgment and oppositions thereto.²
 12

13 Courts frequently allow an opposing party to file a surreply to respond to new arguments
 14 and excessive material raised in a reply brief. See, e.g., Provenz v. Miller, 102 F.3d 1478, 1483
 15
 16

17
 18 ¹ While the parties and the Court agreed that this case would proceed on cross-motions
 19 for summary judgment, and that two of the parties' briefs thus would be combined briefs, the
 20 plaintiff's reply memorandum has always been designated solely as a reply brief – not a reply
 21 and an opposition – and is thus limited to 15 pages in length. See Order endorsing Joint
 22 Stipulation and Motion Regarding Submission of Cross-Motions for Summary Judgment (dkt.
 23 no. 12) (Aug. 29, 2006) (setting schedule for four sets of briefs: (1) Defendants' motion for
 24 summary judgment, (2) Plaintiffs' opposition to defendants' motion for summary judgment and
 25 cross-motion for summary judgment, (3) Defendant's reply in support of their motion for
 26 summary judgment and opposition to plaintiffs' cross-motion for summary judgment, and (4)
 27 *Plaintiffs' reply in support of their cross-motion for summary judgment*) (emphasis added).

28 ² For example, plaintiffs, for the first time, in their reply challenge the adequacy of
 29 defendants' search for responsive documents, Plaintiffs' Reply at 11-12; they assert that
 30 principles of equity should bar defendants' Exemption 2 claims regarding the ROE documents,
 31 id. at 27-28; and they assert that the ROE documents listed in the Vaughn index, based on their
 32 dates, likely are not responsive to their requests, id. at 8.

(9th Cir. 1996) (finding that “where new evidence is presented in a reply to a motion for summary judgment, the district court should not consider the new evidence without giving the non-movant an opportunity to respond.”) (citation omitted); Beaird v. Seagate Tech. Inc., 145 F.3d 1159, 1164 (10th Cir. 1998) (indicating that to avoid error, district court must either permit surreply or refrain from relying on new material in reply brief); Prapha-Phatana v. Cooper Tire & Rubber Co., 2006 WL 2683629, *6 (D. Ariz. 2006) (granting defendant’s request to file a lengthier reply due to plaintiff’s filing of brief exceeding page limits); Stevens v. Deluxe Financial Serv., Inc., 199 F. Supp. 2d 1128, 1130 (D. Kan. 2002) (permitting surreply to respond to new arguments presented in reply).

Furthermore, the parties agree that defendants’ surreply should not be due until March 5, 2007 and that the hearing on the parties’ cross-motions for summary judgment should be postponed until March 12, 2007 or sometime thereafter. Defendants are not able to prepare an adequate surreply in sufficient time prior to the hearing currently scheduled for February 26, 2007 due to counsel’s obligations on other cases and previously scheduled vacation plans from February 16 through February 21. The parties’ stipulation, however, would result in only a minor delay for the hearing on the cross-motions for summary judgment.

Accordingly, the parties stipulate and respectfully request that the Court enter an order permitting defendants to file a surreply and postponing the hearing on cross-motions for summary judgment as set forth above.

A proposed order is attached.

Dated: February 14, 2007

Respectfully submitted,

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CV-06-2812 (MHP)

PETER D. KEISLER
Assistant Attorney General

KEVIN V. RYAN
United States Attorney

/s/ Edward H. White
ELIZABETH J. SHAPIRO (D.C. Bar No. 418925)
EDWARD H. WHITE (D.C. Bar No. 468531)
U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Avenue, N.W., Room 6110
Washington, D.C. 20530
Tel: (202) 514-5108
Fax: (202) 318-4268
Email: ned.white@usdoj.gov

Attorneys for Defendants

/s/ Colleen Flynn
COLLEEN FLYNN (SBN 235281)
3435 Wilshire Blvd., Suite 2900
Los Angeles, CA 90010
Tel: (213) 252-9444
Fax: (213) 252-0091
Email: colleen_ucsc@hotmail.com

Attorney for Plaintiffs

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UNITED STATES DISTRICT COURT
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MARGUERITE HIKEN and
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) Case No. CV-06-2812 (MHP)
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) ~~PROPOSED~~ ORDER
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)
) HEARING ON CROSS-MOTIONS FOR
) SUMMARY JUDGMENT
) Date: February 26, 2007
) Time: 2:00 p.m.

~~PROPOSED~~ ORDER

Upon consideration of the STIPULATION TO PERMIT DEFENDANTS TO FILE A
SURREPLY AND TO POSTPONE HEARING, it is hereby

ORDERED that defendants shall be permitted to file a surreply not exceeding 20 pages
by March 5, 2007, and the hearing on cross-motions for summary judgment previously
scheduled for February 26, 2007 will instead be heard at 2:00 p.m., March 26, 2007.

IT IS SO ORDERED.

Dated: 2/15/07


MARILYN HALL PATEL
UNITED STATES DISTRICT JUDGE

Stipulation to Permit Surreply
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